Supreme Court, U.S.
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NO. 89-1088

In the Supreme Court of the United States

OCTOBER TERM, 1989

HELENA MARINE SERVICE, INC.
AND
NEW YORK MARINE MANAGERS, INC.,
Petitioners

versus

ST. PAUL FIRE & MARINE INSURANCE COMPANY
AND
U. S. FIRE INSURANCE COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Considering the public interest in and importance of the integrity and sanctity of contracts, especially broadly used contracts of comprehensive general liability insurance, and the precedential effect of a decision of a Court of Appeals, whether a decision of such Court which in violation of fundamental principles of insurance and contract law construes a key provision in comprehensive general liability insurance contracts wholly without reference to the terms of those contracts, thereby arbitrarily rewriting the contracts and injecting uncertainty into an area where predictability and consistency are essential, can be permitted to stand.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Eighth Circuit were:

Helena Marine Service, Inc.
New York Marine Managers, Inc.[1]
St. Paul Fire & Marine Insurance Company
U. S. Fire Insurance Company

[1]Pursuant to Rule 28.1, New York Marine Managers, Inc. states that it has no subsidiaries. The following is a list of affiliates:

Lombard Pacific Insurance Services
Navigators Insurance
Texas Marine Underwriters Agency
Westcoast Marine Managers

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statement of the Case	3
Reasons Relied On for the Allowance of the Writ	5
Conclusion	7
Certificate of Service	8
Appendix A	A-1
Appendix B	A-2
Appendix C	A-10
Appendix D	A-24
Appendix E	A-25

TABLE OF AUTHORITIES

Page

CASES

American Insurance Co. of City of Newark v. Keane, 233 F.2d 354, 362 (D.C. Cir. 1956), cert. den. 352 U.S. 913, 77 S.Ct. 147, 1 L.Ed.2d 118 (1956) 6

Boardman v. The Lessees of Reed & Ford, 31 U.S. (6 Pet.) 328, 8 L.Ed. 415 (1832) 5

Dundas v. Hitchcock, 53 U.S. (12 How.) 256, 13 L.Ed. 978 (1851) 5

Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp., 361 F.2d 764, 768 (8th Cir. 1966) 6

Slay Warehousing Co., Inc. v. Reliance Ins. Co., 471 F.2d 1364, 1368 (8th Cir. 1973) 6

Universal Towing Co. v. Hartford Fire Insurance Co., 421 F.2d 379, 381 (8th Cir. 1970) 5

Verlo v. Equitable Life Assur. Soc. of U.S., 562 F.2d 1034, 1036 (8th Cir. 1977) 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinions below are contained in the appendices to the Petition for Certiorari. Appendix A is the denial by the Court of Appeals for the Eighth Circuit of Petitioners' Petition for Rehearing and Request or Suggestion of Hearing or Rehearing En Banc. Appendix B is the decision of the Court of Appeals for the Eighth Circuit filed on September 8, 1989. Appendix C is the Memorandum Opinion and Order of the District Court of November 30, 1988. Appendix D is the Judgment of the District Court dated November 30, 1988. Appendix E is the Order of the District Court granting the Motion of Petitioners for Partial Summary Judgment dated January 3, 1988.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1989; and the timely filed Petition for Rehearing and Request or Suggestion of Hearing En Banc were denied on October 20, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Barges owned by Union National Bank of Little Rock (Bank) and under charter to petitioner Helena Marine Service, Inc. (Helena) went adrift from their moorings on December 4, 1982, while fleeted on navigable waters of the Arkansas River, causing extensive loss of and damage to property. Claims in excess of $13 million were asserted by a number of private claimants and by the United States. Both Helena and the Bank were parties defendant in the ensuing litigation, which has been resolved.

In the case at bar, petitioners Helena and New York Marine Managers, Inc. (NYMM), in behalf of underwriters of Helena, seek recovery from respondents as the comprehensive general liability insurers of the Bank, of unreimbursed loss and defense costs of petitioners Helena and NYMM in respect of the claims growing out of the breakaway.

The basis for the claims of petitioners is that petitioner Helena is an additional assured in, and is entitled to the coverage of, respondents' policies.

There are no factual issues and resolution of the question of coverage involves the construction to be made as a matter of law of the terms of the insurance contracts. The District Court in a considered and reasoned opinion granted petitioners' Motion for Partial Summary Judgment, holding that petitioner Helena was a protected person or additional assured under respondents' policies.

Subsequently, a trial was held on the issues of the provability of the claims of petitioners Helena and NYMM and on the extent of liability of respondents under their contracts. The District Court ruled in favor of petitioners on these issues as well, and respondents did not appeal from these rulings.

The Panel Opinion of the United States Court of Appeals for the Eighth Circuit reverses the decision of the District Court on the coverage issue.

Petitioners filed a Petition for Rehearing and Request or Suggestion of Hearing or Rehearing En Banc, which were denied.

The basis for jurisdiction in the District Court is the assertion of an admiralty or maritime claim under 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

If permitted to stand, the decision of the Court of Appeals would dangerously erode and undercut the integrity of insurance contracts, including broadly used contracts of comprehensive general liability insurance, in which there is palpably a significant public and commercial interest. In construing a key provision in the comprehensive general liability insurance contracts of respondents, the Court of Appeals inexplicably disregards entirely the terms of the contracts. Such an approach reflects a shocking disregard of long established fundamental principles governing construction of contracts, which require that the intention of the parties be determined by the contract itself, considered as a whole.[1] Indeed, the decision of the Court of Appeals makes not the slightest reference to the terms of the insurance contracts which constitute the context in which the provision in question must be construed and given meaning.[2] In the case at bar,

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1 *Boardman v. The Lessees of Reed & Ford*, 31 U.S. (6 Pet.) 328, 8 L.Ed. 415 (1832); *Dundas v. Hitchcock*, 53 U.S. (12 How.) 256, 13 L.Ed. 978 (1851).

2 *Slay Warehousing Co., Inc. v. Reliance Ins. Co.*, 471 F.2d 1364, 1368 (8th Cir. 1973); *Verlo v. Equitable Life Assur. Soc. of U.S.*, 562 F.2d 1034, 1036 (8th Cir. 1977).

therefore, the Court of Appeals arbitrarily and improperly rewrote the insurance contracts.[3]

The anomalous approach of the Court of Appeals obviously has serious and far-reaching implications, considering the public interest in and commercial importance of insurance contracts, particularly contracts of comprehensive liability insurance, and the obvious need for consistency and predictability in this field.

Therefore, the decision of the Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This case should be reversed and remanded to the Court of Appeals for the Eighth Circuit with directions to employ correct principles of construction, as did the District Court, and thereby to construe and give meaning to the provision in question within the context of all of the terms of the insurance contracts.

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3 *American Insurance Co. of City of Newark v. Keane*, 233 F.2d 354, 362 (D.C. Cir. 1956), cert. den. 352 U.S. 913, 77 S.Ct. 147, 1 L.Ed.2d 118 (1956); *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp.*, 361 F.2d 764, 768 (8th Cir. 1966); *Universal Towing Co. v. Hartford Fire Insurance Co.*, 421 F.2d 379, 381 (8th Cir. 1970).

CONCLUSION

For the reasons stated in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this _____ day of _____, 1990, served by mail a copy of the foregoing Petition on counsel for all parties to this proceeding.

_____

J. Barbee Winston

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

Nos. 88-2843 and
88-2844EA

Helena Marine Service, Inc.; New York Marine Managers, Inc.,	*	
Appellees,	*	Order Denying Petition For Rehearing With Suggestion For Rehearing En Banc
vs.	*	
St. Paul Fire and Marine Insurance Company and United States Fire Insurance Company,	*	
Appellants.	*	

The suggestion for rehearing en banc filed by appellees has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

October 20, 1989

Order entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 88-2843
No. 88-2844

St. Paul Fire and Marine Insurance Company and United States Fire Insurance Company, Appellants, v. Helena Marine Service, Inc. and New York Marine Managers, Inc. Appellees.	* * * * * * * * * * * * * * *	Appeal from the United States District Court for the Eastern District of Arkansas

Submitted: June 14, 1989
Filed: September 8, 1989

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge, and Hanson,* Senior District Judge.

Hanson, Senior District Judge.

This is an appeal from a judgment entered in favor of appellees and against appellant St. Paul Fire and Marine Insurance Company (St. Paul) and against appellant United States Fire Insurance Company (U.S. Fire). We reverse the judgment of the District Court.

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*The HONORABLE WILLIAM C. HANSON, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

1. The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

FACTS

This case first arose as a diversity action filed by appellee Helena Marine Service, Inc. (Helena) against appellants. Helena brought suit claiming entitlement to insurance coverage under comprehensive general liability (CGL) insurance policies issued by appellants to the Union National Bank (Union). Helena sought this coverage after a number of barges it chartered from Union broke from their moorings on the Arkansas river causing extensive damage. The court below found this accident the result of Helena's negligence.

Helena asserts coverage under a provision of the CGL policy St. Paul issued to Union which extends coverage to specified other parties. It is undisputed that if coverage exists under St. Paul's policy, it also exists under U.S. Fire's excess CGL policy. The provision at issue states:

> 5. If you [Union] operate mobile equipment in your business, such as road construction equipment or fork lifts, then:
>
> * Your employees are protected while they're using mobile equipment on public highways for your work.
>
> * Other persons or organizations are also protected while using mobile equipment registered to you, provided they had your permission. They're not protected, however, if other valid and collectible insurance is available to cover the liability.

The barges which caused the damage are owned by Union. They were immediately leased to Helena after their purchase through a seven year "Bareboat Charter". The charter includes a provision whereby "[a]t the expiration of the charter term, and at the option of the Owner [Union], Charterer [Helena] shall purchase all of the barges then subject to this charter for an amount equal to the then fair market value of each barge." The charter made Helena responsible for all day-to-day operations of the barges, subject only to Union's right to maintain the barges should Helena fail to do so. Union did retain, through the charter, the right to claim any Investment Tax Credits and depreciation resulting from the purchase and use of the barges. The charter agreement also required Helena to purchase approximately $6 million in primary and excess marine insurance to cover the barges.

After this suit was initiated appellee New York Marine Managers, Inc. (NYMM), one of Helena's insurers, filed a motion to intervene seeking partial indemnification from appellants for money NYMM paid out under its policy with Helena. The District Court allowed this intervention although it resulted in a loss of diversity jurisdiction. The court, believing it retained admiralty jurisdiction, then ruled in favor of Helena and NYMM finding that Helena was covered under Union's GLC and that NYMM was entitled to reimbursement from appellants as co-insurers of Helena. Appellants timely appealed.

Two matters must be addressed by this court -- whether the district court had jurisdiction to issue judgment in this case, and if so whether it properly interpreted the insurance policies at issue.

JURISDICTION

We find appellants' challenge to the district court's asserted admiralty jurisdiction to present a very close question of law. However, we find that we do not need to specifically resolve this issue because of the unique circumstances of this case.

We can bypass the admiralty jurisdictional issue because if there is no admiralty jurisdiction in this case, then it was reversible error for the district court to allow the intervention of NYMM and its accompanying destruction of diversity jurisdiction. NYMM did not have the right to intervene under Federal Rules of Civil Procedure 24(a) because its interest in this case, establishing that Helena was covered by appellant's CGL policies, was adequately represented by Helena. Admittedly, if Helena was successful on the merits NYMM would have additional claims which it would want to pursue, but these claims could be pursued in separate litigation without any prejudice caused by the fact that they were not tried in this case. Thus, NYMM's intervention was permissive in nature and allowable through Rule 24(b), rather than 24(a). Accordingly, as 24(b) intervention must be supported by independent jurisdictional grounds, the

intervention was improper unless there was admiralty jurisdiction. *Babcock & Wilcox Company v. Parsons Corporation,* 430 F.2d 531, 540 (8th Cir. 1970).

Thus, jurisdictionally we are left with the proposition that if there is not admiralty jurisdiction present, then it was error for the court to allow the intervention of NYMM. In such a situation it is clear that we have the authority to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction in order to preserve jurisdiction and reach the merits of the case if doing so will not harm any of the remaining parties and will prevent a waste of judicial time and resources. *See Newman-Green, Inc. v. Alfonzo-Larrain,* 109 S.Ct. 2218, 2225-2226 (1989). This is such a case. Therefore, this court does have jurisdiction, either admiralty or diversity, to determine the issue of whether Helena was a covered party under Union's CGL insurance policies. Because our determination of the merits of this insurance issue negates all other claims before us, it is unnecessary to determine whether we also have jurisdiction to consider NYMM's related claims.

THE MERITS

The district court found coverage for Helena through Union's CGL policies under the provision stating that "[i]f you [Union] operate mobile equipment in your business, such as road construction equipment or fork lifts, then *** [o]ther persons or organizations are also protected while using mobile equipment

registered to you, provided they had your permission." The court based this determination on its finding that the barges qualified as mobile equipment within the meaning of the CGL policy, and on its finding that the bank operated the barges in its business. The policy contains no definition of mobile equipment or the word operate.

We first address whether Union National Bank operated barges in its business. As there are no disputed facts concerning the extent of Union's involvement in the operation of the barges this inquiry is strictly an issue of law. Neither party has cited any controlling authority regarding the meaning of operate in the context that the phrase reaches us, and the issue appears to be one of first impression.

We find that Union did not operate barges in its business as that phrase is used in the insurance contract. The record establishes that Helena and Union had basically entered into a financing arrangement whereby Union financed the barges on behalf of Helena with Helena operating the barges. Union merely owned the barges. Owned does not equal operate. *See generally* Cases collected in 29A *Words and Phrases,* under "Operate" at 392-403 (owner does not operate car unless he drives it himself; operate frequently used by legislatures in active sense such as running a mill or carrying on its business; operate a machine means to work the machine, to regulate and control its management and operation). Thus, we find that to give the phrase "operate in your business" a

meaning that can be met merely through ownership would be to stretch the term well beyond its accepted meaning.

Appellees argue that as the policy at issue is an insurance contract drafted by appellants all ambiguities must be construed against appellants. Although we agree with this basic tenet of insurance law we do not find it helpful to appellees. Just because the phrase "operate in your business" may be ambiguous in some contexts does not give courts the discretion to give the phrase a meaning which is clearly beyond its intended scope. *See El Paso Natural Gas Co. v. Western Bldg. Assoc.*, 675 F.2d 1135, 1141 (10th Cir. 1982). Common sense still plays a role in the interpretation of contracts. *Garbincius v. Boston Edison Co.*, 621 F.2d 1171, 1177 (1st Cir. 1980). Indeed, appellees' construction would apparently result in a bank being deemed to operate any business or vehicle it finances if it retains title in the financing arrangement. This is simply not what operate means. Accordingly, we find that Helena was not covered by Union's CGL policies.

In addition to arguing that Union did not operate barges in its business, appellants also contend that their policies do not cover Helena because barges do not constitute mobile equipment under the terms of the insurance contract. Our finding that Union did not operate barges in its business negates the need for any further analysis of the insurance contract. Thus, we

note only that we do find the assertion that the barges constituted the type of mobile equipment envisioned by the CGL policy to be problematic because of the limiting phrase "such as road construction equipment or fork lifts" found in the policy. The "phrase 'such as' is not a phrase of strict limitation", but it is "a phrase of general similitude". *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981).

Thus, we reverse the judgment of the district court and dismiss all claims against appellants.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

HELENA MARINE SERVICE, INC., NEW YORK MARINE MANAGERS, INC. PLAINTIFFS

v. No. LR-C-85-814

ST. PAUL FIRE AND MARINE INSURANCE COMPANY and UNITED STATES FIRE INSURANCE COMPANY DEFENDANTS

MEMORANDUM OPINION AND ORDER

On November 26, 1985, Helena Marine filed a diversity complaint for declaratory judgment of coverage as an additional insured and recovery of unreimbursed losses and defense costs from defendants arising out of claims made by the United States and private claimants due to a breakaway of barges on the Arkansas River. An amended complaint was filed on January 9, 1986. After being granted permission by the Court over defendants' objections, New York Marine filed a complaint in intervention on August 14, 1986, based on both diversity and admiralty jurisdiction representing bumbershoot underwriters seeking indemnity and/or contribution from defendants

on the basis of double or other insurance. Defendants' answer to the amended complaint and the complaint in intervention was filed on August 25, 1986, and on October 6, 1986, St. Paul requested a jury trial. New York Marine moved to strike that jury request stating that diversity jurisdiction had been destroyed by its intervention so that only admiralty jurisdiction, which defendants had admitted, remained and that a jury trial was not available in admiralty proceedings. The Court agreed and by order filed on September 8, 1987, the jury demand was stricken.

On February 3, 1988, this Court filed an order granting plaintiffs' motion for partial summary judgment and denying defendants' motion for summary judgment on the issue of whether Helena Marine is a "protected person" under the policies of insurance issued by defendants to Union National Bank. Defendants had argued that if Helena Marine had other valid and collectible insurance to cover the liability, then Union National's insurance contract did not become operative since that condition precedent to extending coverage to Helena Marine as an additional insured had not been met. They further argued that the barges were not "mobile equipment" and that Union National did not "operate" the barges in its business. The Court found that the provision regarding other valid and collectible insurance was not a condition precedent, that "mobile equipment" did include the barges partly based on the fact that the policy provided

for protection in international waters, and Union National did operate the barges in its business. Thus, the Court found that Helena Marine was a "protected person" under the defendants' policies. Defendants moved to amend that order so as to take an interlocutory appeal, but the Court denied that motion on February 8th.

On February 8th, the morning of trial, defendants filed a motion to dismiss for lack of subject matter jurisdiction. They argued that since New York Marine had acknowledged that diversity jurisdiction was destroyed when it intervened and that the intervention was permissive, the only basis for this Court's jurisdiction would be maritime or admiralty jurisdiction and a declaratory judgment proceeding is not available in admiralty actions. Although they observe that they did at one time admit jurisdiction, they assert that the case should be dismissed when it appears that the Court does indeed lack subject matter jurisdiction.

At the beginning of the trial, the Court noted the motion and after hearing argument of counsel, took the matter under advisement to permit plaintiffs an opportunity to respond with authority for their position. The Court then proceeded to hear evidence with the trial concluding on February 9th. A briefing schedule was announced for proposed findings of fact and conclusions of law with supporting memoranda. After several extensions were given to the parties, the last of the initial, responding and reply briefs was submitted in June.

The Court first addresses the jurisdictional issue raised by defendants in their motion to dismiss and further briefed by the parties in their post-trial submissions. Defendants attack the basis of admiralty jurisdiction on two grounds. The first argument is that the policy issued to Union National was not a policy of marine insurance expressly issued to cover marine risk so there are no unique admiralty concepts or principles of law which trigger admiralty jurisdiction. Their second argument is the lack of authority for an admiralty court to grant declaratory relief which was discussed in the context of the motion to dismiss. Plaintiffs' counter that since this Court has found that the insurance policies in question cover the barges, the policies cover marine risks so the policies are maritime contracts and the allegations of liability under those contracts state a maritime cause of action. Plaintiffs further dispute the cases relied upon by defendants regarding declaratory relief in admiralty proceedings.

Good discussions of marine insurance or contracts within the context of admiralty or maritime jurisdiction can be found in *Royal Ins. Co. of America v. Pier 39 Ltd.*, 738 F.2d 1035 (9th Cir. 1984) and *Inversiones Calmer, S.A. v. C.E. Heath & Co.*, 681 F. Supp. 100 (D. P.R. 1988). Applying the principles summarized in those cases, the Court finds that this lawsuit seeks resolution of disputes regarding the interpretation and enforcement of insurance contracts where some of the interests insured, *i.e.* the barges, are maritime. As

these policies and "mixed contracts" of both maritime and nonmaritime elements and the maritime subject matter at issue in this lawsuit is capable of being divided from the nonmaritime parts, then this Court can exercise admiralty jurisdiction over the separate maritime elements of the policies. *See, Hale v. Co-Mar Offshore Corp.*, 588 F. Supp. 1212 (W.D. La. 1984).

The Court has carefully explored the issue of whether declaratory relief is available in an admiralty proceeding. In the few cases that have directly addressed this issue, there is a split of authority. While *American Mfrs Mut Ins Co. v. Manor Investment Co.*, 286 F. Supp. 1007 (S.D. N.Y. 1968) clearly holds that a declaratory judgment is not available in admiralty actions, *Insurance Co. of No. America v. Langan Constr Co.*, 327 F. Supp. 567 (S.D. Ala. 1971) expressly rejects that holding and finds that declaratory judgment is within the purview of admiralty jurisdiction. In reviewing these two opposing views, *Travelers Indem Co. v. Boles*, 502 F. Supp. 179 (N.D. Cal. 1980) stated that it was not persuaded that it lacked the power to grant declaratory relief, but it declined to entertain the action due to the pendency of a parallel state action. Although the jurisdictional aspect was not addressed, the Court notes that declaratory relief was sought and granted in *McKeithen v. S.S. Frosta*, 430 F. Supp. 899 (E.D. La. 1977), but denied in *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866 (2nd Cir. 1985) and *Royal Ins. Co. of America v. Pier 39 Ltd., supra.* Thus it appears that those

courts did not question their authority to grant such relief in the proper admiralty case. The Court finds that the more recent, better reasoned and greater weight of authority supports the availability of declaratory relief in admiralty proceedings such as presented here. Therefore, defendants' motion to dismiss is denied.

Defendants have again argued in their post-trial submissions that Helena Marine is not a "protected person" and so is not covered as an additional insured under their policies. As was discussed earlier in this opinion, partial summary judgment was granted to plaintiffs on this issue when the Court found on February 3rd that Helena Marine was indeed a "protected person" under defendants' policies. Defendants have not presented any additional evidence or argument to change that ruling and to the extent that defendants' are asking for reconsideration on this issue, that request is denied.

After carefully reviewing and researching the submissions of the parties in light of the evidence and the applicable law, the Court now makes the following findings of fact, with the stipulated facts so designated:

1. At all pertinent times, the Union National Bank of Little Rock was the owner of the Barges RMW 10, RMW 11, RMW 12, RMW 13, RMW 14, RMW 15, RMW 16, RMW 17, RMW 18, and RMW 19 (hereinafter "RMW barges"). (NYMM Exh. 1, Stipulation 1)

2. Pursuant to charter party dated February 24, 1979, the RMW barges were chartered by the Union National Bank of Little Rock to Helena. (NYMM Exh. 1, Stipulation 2)

3. On or about December 4, 1982, during the term of said charter, the RMW barges were moored in a chute upriver of the Pendleton Fleet at Mile 25-26 of the Arkansas River. (NYMM Exh. 1, Stipulation 7)

4. On or about December 4, 1982, during a period of high water, the RMW barges went adrift from their moorings. (NYMM Exh. 1, Stipulation 8)

5. The RMW barges were moored contrary to Coast Guard regulations, inadequately and improperly as reflected by the testimony of Blake Robertson, Steve Maxwell, David Curtis and William Kellum. Helena had knowledge of the place where and manner in which the RMW barges were moored and also had knowledge that high water conditions would occur as shown by the testimony of Robertson and Maxwell. Accordingly, the RMW barges went adrift as a result of negligence on the part of Helena.

6. Certain barges, including some of the RMW barges, drifted downriver and ultimately came to rest against Dam No. 2. (NYMM Exh. 1, Stipulation 9) In this process the RMW barges drifted downstream and into the Pendleton Fleet, as a consequence of which barges in the Fleet were set adrift, as were other barges downstream of the Fleet. The Coast Guard report, which was admitted as NYMM Exh. 16, was not considered by the Court during any of these factual determinations in accordance with *Huber v. U.S.*, 838 F.2d 398 (9th Cir. 1988).

7. As a result of the breakaway, the United States and certain private claimants made claims against Helena in excess of Thirteen Million ($13,000,000.00) Dollars. (NYMM Exh. 1, Stipulation 10)

8. Said claims were litigated in prior civil actions before this Court. See No. PB-C-83-197, C/W 83-198, 83-199, 83-200, 83-201, 84-90, LR-85-746-M, and PB-85-176-M. (NYMM Exh. 1, Stipulation 11)

9. The claims of the United States and the private claimants were compromised and settled pursuant to the terms of the Order Approving Settlement Agreement and Stipulation for Compromise Settlement and Dismissing All Claims With Prejudice signed by this Court and entered in the said prior litigation on March 27, 1986, and by the General Release executed by all parties named in the Civil Actions referred to in Paragraph 8. (NYMM Exh. 1, Stipulation 12)

10. Certain underwriters (hereinafter referred to as "primary marine underwriters") subscribed to Policy No. A&P/H-10157 issued to Helena and others, and said policy was in effect at all times pertinent hereto. (NYMM Exh. 1, Stipulation 3)

11. Pursuant to the Order and Release, in the said prior litigation primary marine underwriters paid the limit of their liability for indemnity in the amount of One Million ($1,000,000.00) Dollars and certain defense costs. (NYMM Exh. 1, Stipulation 13)

12. Certain underwriters (hereinafter referred to as "bumbershoot underwriters") through New York Marine Managers, Inc. ("New York") subscribed to Policy No. A&P/H-8777 issued to Helena and others, and said policy was in effect at all times pertinent hereto. (NYMM Exh. 1, Stipulation 4)

13. Pursuant to the Order and Release, bumbershoot underwriters paid the limit of their policy in the amount of Five Million ($5,000,000.00) Dollars in defense and indemnity, and, in addition, paid Two Hundred Ten Thousand ($210,000.00) Dollars in interest. (NYMM Exh. 1, Stipulation 14)

14. St. Paul Fire and Marine Insurance Company issued its Policy No. 603NB2396 to Union National Bank of Little Rock and Union of Arkansas Corporation, and said policy was in effect at all times pertinent hereto. (NYMM Exh. 1, Stipulation 5)

15. United States Fire Insurance Company issued its Policy No. 5231883411 to Union National Bank of Little Rock and Union of Arkansas Corporation, and said policy was in effect at all times pertinent hereto. (NYMM Exh. 1, Stipulation 6)

16. St. Paul and Marine Insurance Company and United States Fire Insurance Company, as insurers of the Union National Bank, were made aware of negotiations leading to the settlement referred to in Paragraph 9 above, were requested to contribute to said settlement and to the payment of costs of Helena incurred in the defense of the said claims of the United States and private claimants, but did not do so. (NYMM Exh. 1, Stipulation 15)

17. Four months prior to concluding settlement of the claims of the United States and of the private claimants in the said prior litigation, plaintiff Helena instituted this civil action against defendants seeking a judgment that the policies of defendants covered the liability of Helena with respect to the losses arising out of the breakaway. Further, the General Release attached to and incorporated in the Order of this Court entered on March 27, 1986, in the said prior litigation, provides on page 8, as follows:

> Helena and bumbershoot underwriters reserve all claims, rights, and causes of action against any insurer of the bank, including, without limitation, on the basis of double, over, or other insurance.

18. Due to the involvement of the defendants in the prior litigation, their knowledge of the settlement of those claims and the demand made on defendants by the filing of this action four months prior to that settlement, only the reasonableness of the settlement need be shown. The foreseeable consequence of Helena's negligence with the mooring of the RMW barges which would become adrift and strike downstream barges and the dam has already been found by this Court. The properly admitted

evidence by Kellum, Patterson, and James Daugherty establishes that by reason of the breakaway, Helena would have been liable for damages in excess of the amount paid in settlement. The proof demonstrates damages in the aggregate amount of $10,215,041.08 were sustained.

19. Helena paid attorney's fees and costs in connection with the defense of the fleet breakaway litigation totalling $53,423.21, and advanced $140,000.00 cash toward the settlement of that underlying litigation.

20. Union National Bank advanced $150,000.00 on behalf of Helena which was reflected as an account receivable owed by Helena to Union National.

21. The $150,000.00 advance made by Union National on behalf of Helena was repaid from insurance proceeds arising out of the sinking of the motor vessel Nancy Boswell, formerly M/V Pete Harp.

22. The M/V Nancy Boswell was previously pledged as collateral to secure a separate debt owed by Helena to Union National on a fleet mortgage.

23. As a result of the repayment of the $150,000.00 account receivable debt from insurance proceeds, the fleet mortgage of Helena did not receive the $150,000.00 credit. The $150,000.00 loan to Helena by Union National was an obligation of Helena and, therefore, was an element of damages suffered by Helena.

24. Thus, the total loss of Helena was $343,423.21.

25. The excess policy of defendant United States Fire Insurance Company in Condition I contains the following provision:

> Other Insurance. If other collectible insurance including other insurance with this company is available to the insured covering a loss also covered hereunder (except insurance

> purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of and not contribute with, such other insurance.

The bumbershoot policy (Policy No. A&P/H-8777), in Condition G, provides:

> Other Insurance.
>
> If other valid and collectible insurance with any other Insurer is available to the Assured covering a loss also covered by this Policy, other than insurance that is excess of the insurance afforded by this Policy, the insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance, either as double insurance or otherwise. . . .

In light of the above findings of fact, the Court now makes the following conclusions of law:

1. This claim is within the admiralty and maritime jurisdiction. See, 28 U.S.C. § 1333.

2. The negligence of Helena was a proximate cause of the RMW barges going adrift; and a foreseeable consequence of that negligence was that the RMW barges would drift into and set adrift barges in the Fleet and other barges moored downstream. Accordingly, Helena is legally liable for the damages caused by the breakaway.

3. Plaintiff New York, in behalf of bumbershoot underwriters, has shown that the amounts paid in settlement and in legal fees were reasonable and in good faith, considering the issue of Helena's liability and the damages. *See, Burlington Northern, Inc. v. Hughes Bros.*, 671 F.2d 279 (8th Cir. 1982); *Burke v. Ripp*, 619 F.2d 354 (5th Cir. 1980). For compilations of

other cases, *see also Bainville v. Hess Oil V.I. Corp*, 837 F.2d 128 (3rd Cir. 1988) and *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755 (11th Cir. 1987). In any event, New York has proved actual liability on the part of Helena for damages growing out of the breakaway that exceeds the amounts paid in settlement and defense costs.

4. It is therefore appropriate for the Court to turn to the allocation as between the various underwriters of the unreimbursed expenses of Helena and of the amounts paid in settlement and in legal fees by bumbershoot underwriters. As the limit of the primary marine insurance policy in the amount of $1,000,000.00 was paid, and as the balance of the damages exceeds the limit of the primary policy of St. Paul Fire and Marine Insurance Company in the amount of $100,000.00, St. Paul must respond up to the limit of that policy. Being a protected person or additional assured under both primary policies, Helena is entitled to and must receive the benefit of both. Other insurance clauses, such as those involved in the policies of insurance in the instant case, are not intended to affect the amount of coverage to which an assured is otherwise entitled.

5. As both primary policies have thereby been exhausted, the excess policy of United States Fire Insurance Company and the bumbershoot policy are brought into play, and the Court next turns to the matter of allocation of the excess of the claims asserted as between bumbershoot underwriters, which have already paid out the sum of $5,210,000.00, and the excess policy of United States. The limit of said excess policy is $10,000,000.00, while that of bumbershoot underwriters is $5,000,000.00, which, in combination, are more than sufficient to cover the balance of the claims asserted.

6. The other insurance clauses in the bumbershoot and in the excess policy are virtually identical in wording, being denominated "excess clauses," and, being for practical purposes identical, they are considered mutually repugnant because to

enforce each one literally would leave the assured without excess insurance. *See, Calvert Fire Insurance Company v. Francis,* 259 Ark. 291, 532 S.W. 2d 429 (1976). Under these circumstances, the claims as between the two excess insurers should be apportioned based on the limits of the respective policies. *See, Insurance Co. of North American v. Nicholas,* 259 Ark. 390, 533 S.W. 2d 204 (1976); *Appleman, Insurance Law and Practice,* § 4906 at pp. 347-349 and § 4909 at pp. 383-408; *Couch on Insurance 2d,* § 62.80 at pp. 551-555.

7. The Court turns finally to the calculation of the loss allocation between the excess and the bumbershoot underwriters. After payment of the limit of the primary policy of St. Paul Fire and Marine Insurance Company in the amount of $100,000.00 toward the unreimbursed expenses of Helena, the aggregate amount of the claims which are for the account of the excess underwriters and bumbershoot underwriters is the balance remaining of the unreimbursed expenses of Helena in the amount of $243,423.21 and the claim of bumbershoot underwriters in the amount of $5,210,000.00. Apportioning the total of said amounts, $5,453,423.21, in accordance with policy limits, the excess underwriters would bear $3,635,615.47 while New York would bear $1,817,807.74. Accordingly, the primary insurer, St. Paul Fire and Marine Insurance Company, must pay to Helena the sum of $100,000.00 and the excess underwriters, United States Fire Insurance Company, must pay to Helena the sum of $243,423.21 and to New York in behalf of bumbershoot underwriters the amount of $3,392,192.26.

8. Prejudgment interest from March 27, 1986, the date of the signing and entry of the Order Approving Settlement and Dismissing All Claims With Prejudice in the prior litigation is awarded to ensure full compensation and there are not any exceptional or peculiar circumstances. *See, Ohio River Co. v. Peavey Co.,* 731 F.2d 547 (8th Cir. 1984). Furthermore, tolling of prejudgment interest from the date of trial to

judgment is not warranted where defendants raised the jurisdictional issue which was one of the subjects of the post-trial briefs the date of trial, the final brief was not submitted until June, extensive research was needed to resolve the numerous issues, and the Court had to request additional briefs from the parties. Furthermore, the Court notes that defendants have had the use of the sums sought by the plaintiffs during the pendency of this action.

9. Applying the standards of *Havens Steel Co. v. Randolph Engineering Co.*, 813 F.2d 186 (8th Cir. 1987) and *Ohio River Co. v. Peavey Co., supra*, the Court is persuaded, based on the exhibits attached to plaintiffs' supplemental brief on this issue that prejudgment interest should be awarded at the average prime interest rate from March 27, 1986, to date of 8.25%.

Accordingly, Helena Marine is entitled to judgment against St. Paul in the amount of $100,000.00 and against United States Fire in the amount of $243,423.21. New York Marine is entitled to judgment against United States Fire in the amount of $3,392,192.26. Prejudgment interest on these amounts is awarded at the rate of 8.25% from March 27, 1986, to this date with postjudgment interest to accrue at the statutory rate.

IT IS SO ORDERED this 30 day of November, 1988.

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UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

HELENA MARINE SERVICE, INC., NEW YORK MARINE MANAGERS, INC. PLAINTIFFS

v. No. LR-C-85-814

ST. PAUL FIRE AND MARINE INSURANCE COMPANY and UNITED STATES FIRE INSURANCE COMPANY DEFENDANTS

JUDGMENT

In accordance with the Memorandum Opinion and Order filed this date, judgment is hereby entered in favor of Helena Marine Service, Inc. and against St. Paul Fire and Marine Insurance Company in the amount of $100,000.00 and against United States Fire Insurance Company in the amount of $243,423.21. Judgment is also entered in favor of New York Marine Managers, Inc. against United States Fire Insurance Company in the amount of $3,392,192.26. Prejudgment interest on those sums is awarded at the rate of 8.25% from March 27, 1986, to the date of this judgment with postjudgment interest to accrue at the statutory rate.

DATED this 30 day of November, 1988.

UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

HELENA MARINE SERVICE, INC., NEW YORK MARINE MANAGERS, INC. PLAINTIFFS

v. No. LR-C-85-814

ST. PAUL FIRE AND MARINE INSURANCE COMPANY and UNITED STATES FIRE INSURANCE COMPANY DEFENDANTS

ORDER

Pending before this Court are plaintiffs' motion for partial summary judgment and defendants' motion for summary judgment. On September 9th, this Court denied similar motions so the parties have provided further argument and authority for their positions. The issue to be resolved is whether Helena Marine is a "protected person" under the policies of insurance issued by defendants to Union National Bank (UNB).

Defendants argue that in order for Helena Marine to be a "protected person", plaintiffs must prove that there was no valid and collectible insurance available to cover the liability, that the RMW barges are "mobile equipment" under the terms of the Comprehensive General Liability (CGL) policies, and that UNB operates the barges in its business enterprise.

Defendants assert that the provision regarding the insuring clause contains a condition precedent so that UNB's insurance contract does not become operative and coverage does not extend to Helena if other valid and collectible insurance is available to Helena to cover the liability. While defendants contend that their policies are simply not effective since the condition precedent to extending coverage to Helena as an additional insured was not met, it alternatively argues that plaintiffs have not shown that the RMW barges are "mobile equipment" or that UNB "operated" the barges in its business.

Plaintiffs contend that the provision regarding other valid and collectible insurance is not a condition precedent, but is an "other insurance" clause. Since there are competing "other insurance" clauses in this case, plaintiffs argue that this is an "escape clause" which acts conditionally with its effect to be determined later rather than as an exclusion. Plaintiffs assert that for Helena to be a "protected person", the only criteria are that the barges owned by UNB are "mobile equipment", that UNB "operated" the barges in its business, and that Helena used the barges. On the question of "mobile equipment", they state that the policies do not limit that term to land equipment since the references to land-based equipment are preceded by non-exclusive terms like "include" or "such as" rather than "means" or "is". They further argue that the policies do not contain watercraft exclusions and

specifically provide that under the primary policy, events taking place in "international waters" are protected. Plaintiffs also rely on the contention that "operate" is not limited to day-to-day direction or physical possession and the policies specifically provide that equipment "operated" by UNB could at the same time be "used" by, or within the possession of another, such as Helena. Plaintiffs point out that UNB purchased and then chartered the barges to Helena, but reserving the depreciation and investment tax credit so that the barges were operated as assets of UNB for the purpose of gaining tax benefits and tax credits. Finally, plaintiffs say there is no dispute that Helena was using the barges within the meaning of the policies.

After reviewing the pleadings, exhibits and applicable law, the Court now makes the following findings:

1. That prior litigation, which is of record in this Court *(see In the Matter of the Complaint of Helena Marine Service, Inc., a corporation, and Pendleton Harbor Service, Inc., a corporation, as Owners, Operators and/or Charterers of the M/V J. E. GEGENHEIMER, for Exoneration from or Limitation of Liability,* No. PB-C-83-197, 198, 199, 200, and 201; *In Re Helena Marine Service,* No. LR-85-746M; *In Re: Pendleton Harbor Service, Inc.,* No. PB-85-176M), it was alleged that on or about December 4, 1982, barges fleeted at Mile 25-26 on the Arkansas River, owned by Union National Bank of Little Rock, being Barges RMW 10, RMW 11, RMW 12, RMW 13, RMW 14, RMW 15, RMW 16, RMW 17, RMW 18, and RMW 19, came adrift from their moorings, causing damage to a number of private claimants and to the United States in excess of $13 million.

2. Helena Marine Service, Inc. and New York Marine Managers, Inc., on behalf of bumbershoot underwriters of Helena Marine Service, Inc., made payments toward settlement of said litigation, as shown by Order Approving Settlement Agreement and Stipulation for Compromise Settlement and Dismissing All Claims With Prejudice, and by General Release, which are of record herein.

3. The barges described in Paragraph 1, on or about December 4, 1982, were owned by Union National Bank of Little Rock and under charter to Helena Marine Service, Inc., as shown by copy of Bareboat Charter, which is of record herein.

4. Defendant St. Paul Fire and Marine Insurance Company issued a primary comprehensive general liability policy to Union National Bank of Little Rock in the amount of $100,000.00; and defendant United States Fire Insurance Company issued an excess comprehensive general liability policy to Union National Bank of Little Rock with a policy limit of $10 million, which were in effect on or about December 4, 1982, as shown by copies of the policies, which are of record herein.

5. St. Paul's policy provides in part "[h]erein's a list of 'protected persons' and the limitations on their coverage under this agreement.... If you operate mobile equipment in your business, such as road construction equipment or fork lifts, then: ... Other persons or organizations are also protected while using mobile equipment registered to you, provided they had your permission. They're not protected, however, if other valid and collectible insurance is available to cover the liability."

6. Helena Marine had at its disposal other valid and collectible insurance available to cover the liability.

7. The provision regarding other valid and collectible insurance is not a condition precedent, but is instead an "other insurance" clause or "escape" clause which effect will be determined later. *See, Ark. Grain Corp. v. Lloyd's,* 240 Ark. 750, 402 S.W.2d 118 (1966); *Insurance Co. of North America v. Nicholas,* 259 Ark. 390, 533 S.W.2d 204 (1976); *Appleman, Insurance Law & Practice,* § 4906 at p. 349, and § 4910 at p. 457; *Couch on Insurance 2d,* § 62.85 at pp. 561-564 and § 62:117 at p. 592.

8. Arkansas law provides that "[a]mbiguous provisions are to be construed most strongly against the insurer, which drafts the policy." *Home Indemnity Co. v. City of Marianna,* 291 Ark. 610 at 616, 727 S.W.2d 375 (1987).

9. The term "mobile equipment" is not defined in the policy and the authorities cited by defendants in support of their definition did not contain the exact language found here.

10. Thus, "mobile equipment" is ambiguous and when the construction provision is applied, the Court must find that "mobile equipment" is not limited just to land-based equipment and so does include the RMW barges. Support for this interpretation is found by the non-exclusive language "such as" and "for example" and the fact that the next provision in the policy provides for protection in international waters.

11. The term "operate" is also not defined. Again applying the Arkansas rule for construction, the Court finds that UNB did operate the barges in its business. Support for this construction is found by the provision that permits other persons or organization to use the barges while *registered* to UNB. Thus, the policy language provides that UNB did not have to exercise exclusive control over the barges at the time. It is not disputed that UNB owned and leased the barges as part of its business enterprise.

12. Finally, it is also undisputed that Helena was indeed using the barges at the time of the incident.

Accordingly, the Court finds that Helena was a "protected person" under the defendants' policies. Plaintiffs' motion for partial summary judgment is hereby granted and defendants' motion for summary judgment is hereby denied.

IT IS SO ORDERED this 3 day of January, 1988.

UNITED STATES DISTRICT JUDGE